IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 69

RONALD L. FREEDMAN,

Appellant,

v.

STATE OF MARYLAND,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

MOTION TO DISMISS OR AFFIRM

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The State of Maryland, pursuant to Rule 16 of the Revised Rules of this Court, moves (a) to dismiss the appeal herein, taken from the final judgment of the Maryland Court of Appeals, on the ground that no substantial federal question has been raised, or, (b) in the alternative, that the judgment appealed from be affirmed.

THE LACK OF A SUBSTANTIAL FEDERAL QUESTION IN THE ISSUES PRESENTED

The Appellant herein seeks to challenge the right of the State of Maryland to examine motion picture films prior to licensing such films for exhibition throughout the State.

It is the position of the State of Maryland that the Maryland practice presents no federal question, as the right of the states to examine motion picture films subject to reasonable standards has clearly been affirmed by this Court on many occasions.

Whether or not the Maryland standards are "reasonable" is not properly before this Court, as the Appellant did not submit his film for examination and application of the standards of the Maryland law.

The question presented to this Court is not novel, unique or peculiar. In the opinion of the State of Maryland, this exact question was affirmatively decided by the Court in *Times Film Corporation v. Chicago*, 365 U.S. 43.

QUESTION PRESENTED

Whether the Maryland Court of Appeals erred in holding that the instant case was controlled by *Times Film Corporation v. City of Chicago*.

THE STATUTE INVOLVED

The statute here sought to be challenged is Article 66A of the Annotated Code of Maryland (1957 Edition), which is set forth in full at App. A, p. 1 of the Jurisdictional Statement and Brief of the Appellant herein.

STATEMENT

The Appellant is the operator and manager of the Rex Theatre in Baltimore, Maryland. On November 1, 1962, Appellant advised the Maryland Motion Picture Censor Board of his intention to deliberately violate the law of Maryland by exhibiting at his theatre a film which had not been submitted to the Board for examination or licensing.

An agent of the Board was present when the film was illegally exhibited and thereafter secured a warrant for Appellant's arrest.

The Appellant was indicted for a violation of Article 66A, §2, which section states, in its entirety:

> "§2. *Unlawful to show any but approved and licensed film.*
>
> It shall be unlawful to sell, lease, lend, exhibit or use any motion picture film or view in the State of Maryland unless the said film or view has been submitted by the exchange, owner or lessee of the film or view and duly approved and licensed by the Maryland State Board of Censors, hereinafter in this article called the Board"

Appellant was found guilty and sentenced to pay a fine of $25. From that conviction and sentence he appealed to the Maryland Court of Appeals.

At trial and on appeal, the Appellant sought to attack the right of the State to examine and license motion picture films, and also sought to attack the standards set out in the Maryland law and applied by the Board for such licensure. The trial court and the Maryland Court of Appeals found that the Appellant lacked standing to challenge the standards, or any section of the statute other than the section for violation of which he was indicted and convicted.

From the decision of the Maryland Court of Appeals, affirming his conviction, this appeal is sought.

I.

Whether the Maryland Court of Appeals erred in holding that the instant case was controlled by *Times Film Corporation v. City of Chicago.*

ARGUMENT

THE COURT'S DECISION IN *TIMES FILM CORPORATION v. CITY OF CHICAGO*, 365 U.S. 43, IS COMPLETELY DETERMINATIVE OF THE ISSUE PRESENTED IN THE INSTANT CASE.

The factual situations in the instant case and in the case of *Times Film Corporation v. City of Chicago* are strikingly parallel, and the decision of the court in *Times Film* is obviously applicable to the case at hand.

Times Film was an action instituted in the United States District Court for the Northern District of Illinois, wherein the plaintiff attempted to challenge an ordinance of the City of Chicago which, as a prerequisite to public exhibition, required the submission of moving picture films to a censor. The ground for the attack was that the constitutional guarantee of freedom of speech was violated by the prior censorship requirement. The District Court dismissed the complaint. *Times Film Corporation v. City of Chicago*, 180 F. Supp. 843. The Court of Appeals for the Seventh Circuit affirmed. *Times Film Corporation v. City of Chicago*, 272 F. 2d 90.

The Court granted certiorari, and affirmed the judgment below. In an opinion by Mr. Justice Clark, the Court held that the ordinance in question was not void on its face.

In *Times*, the Court held that since the exhibitor had refused to submit the film and thus have the standards applied to it, no consideration was required to be given to the validity of the standards set out in the ordinance. The Court noted that the prior motion picture censorship cases which had previously reached the court involved questions of standards. The films in those cases[1] had all

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[1] *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 96 L. Ed. 1098, 72 S. Ct. 777, *supra* ("sacrilegious"); *Gelling v. Texas*, 343 U.S.

been submitted to the authorities and permits for their exhibition were refused because of their content. The Court said:

> "Obviously, whether a particular statute is 'clearly drawn' or 'vague' or 'indefinite,' or whether a clear standard is in fact met by a film are different questions involving other constitutional challenges. * * *."

The court found the petitioner's attack in *Times Film* to be a challenge to the censors' basic authority and an attempt to have the court hold that the public exhibition of motion pictures must be allowed under any circumstances, and that previous restraint cannot be justified regardless of the capacity for, or extent of such an evil.

The court rejected that contention (5 L. Ed. 2d 407):

> "With this we cannot agree. We recognize in Burstyn, 343 U.S. 495, supra, that 'capacity for evil * * * may be relevant in determining the permissible scope of community control,' * * *, and that motion pictures were not 'necessarily subject to the precise rules governing any other particular method of expression, Each method,' we said, 'tends to present its own peculiar problems.' * * *. Certainly petitioner's broadside attack does not warrant, nor could it justify on the record here, our saying that — aside from any consideration of the other 'exceptional cases' mentioned in our decisions — the State is stripped of all constitutional power to prevent, in the most effective fashion, the utterance of this class of speech. It is not for this Court to limit the State in its selection of the remedy it deems most

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960, 96 L. Ed. 1359, 72 S. Ct. 1002 (1952) ["prejudicial to the best interest of the people of said City"]; *Commercial Pictures Corp. v. Regents of U. of New York*, 346 U.S. 587, 98 L. Ed. 329, 74 S. Ct. 286 (1954) ["immoral"]; *Superior Films, Inc. v. Department of Education*, 346 U.S. 587, 98 L. Ed. 329, 74 S. Ct. 286 (1954) ["harmful"]; *Kingsley International Pictures Corp. v. Regents of U. of New York*, 360 U.S. 684, 3 L. Ed. 2d 1512, 79 S. Ct. 1362 (1959) ["sexual immorality"].

effective to cope with such a problem, *absent, of course, a showing of unreasonable strictures on individual liberty resulting from its application in particular circumstances.*" (Emphasis supplied.)

The Supreme Court's approval, in *Times, supra,* of the right of the State to set up standards for the exhibition of motion picture films was restated as recently as February 18, 1963, in *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58, 9 L. Ed. 2d 584, 83 S. Ct. 631. The court, in *Bantam,* found unconstitutional a Rhode Island agency created to educate the public concerning any book containing obscene, indecent or impure language, and to investigate and recommend the prosecution of all violations of appropriate ordinances. The court pointed out, however, that nothing in that opinion was inconsistent with its holding in *Times* that prior restraint was not necessarily unconstitutional under all circumstances.

It is the position of the State of Maryland that the Appellant herein finds himself in the same position as the petitioner in the *Times Film* case, *supra.* By failing to submit the film to the Censor Board, and to have the standards set out in the law applied to his film, he leaves himself without sufficient ground on which to make objection to those standards. As the court noted in *Times,* the approved method of attacking such standards is to have them applied, and to appeal from an unsatisfactory treatment of that application.

The State of Maryland submits that obscenity never having been considered within the area of freedom of speech as guaranteed by the First Amendment, and extended to the states by the Fourteenth Amendment, statutes requiring licensing and approval of motion picture films are not void on their face. In dealing with motion

pictures, we are dealing with an area wherein we have the approval, however reluctant, of the Supreme Court of the United States to examine and license films, subject to reasonable standards.

If Appellant chooses to attack those standards, or the application of those standards, then our statute provides a proper means of making protest. §19 of Article 66A (App. 10) sets out ample and effective methods of appeal for any person finding himself aggrieved by the action of the Board in making an elimination from a film or in disapproving a film. The Appellant, Freedman, in fact, has in the past effectively pursued the appellate remedies set out in the statute and this Court may take judicial notice of the successful efforts of other persons to have set aside decisions of the Censorship Board with which they disagreed. See *State Board of Motion Picture Censors v. Times Film*, 212 Md. 454, 129 A. 2d 833, and *United Artists v. Maryland State Board of Censors*, 210 Md. 586, 124 A. 2d 292.

The Appellant seeks to sustain his position by stating that the entire statute is validly under attack merely because he saw fit, in his defense to the charge of violating the provisions of §2, to make known his objection to other provisions of the article. Appellant's election of remedies, or of methods of attack, however appropriate they might seem to him, are not binding on this Court, nor on the State of Maryland, any more than would be the attempt of a party in a criminal case to have monetary damages awarded to him, or the attempt of a plaintiff in a civil case to have criminal penalties applied to the defendant. The Appellant herein has chosen the wrong forum for the attack which he seeks to make on the Maryland Motion Picture Censorship. The laws of Maryland provide a proper forum, and recent decisions of the Court, as in *Times*, as reaffirmed

by *Bantam*, strongly indicate that only by electing to choose the proper avenues of complaint may he be heard.

The State of Maryland believes that the most recent decision of a federal court of appeals on the question of movie censorship strongly affirms our position that he who seeks to complain of the standards or procedures must first show that those standards or procedures have been unfairly applied to him. Within months after the decision of this Court in *Times Film*, another plaintiff in the City of Chicago sought to attack the Chicago ordinance. That petitioner, however, did subject himself to the requirements of the statute and on being denied a license for the film in question (said film being "The Lovers," a film ordered to be shown in Maryland by the Baltimore City Court, on appeal by the Appellant Freedman from a denial of a license by the Censor Board), he then brought an action in the federal district court praying for an order directing the City of Chicago to issue to him a permit to exhibit the film. In that case, *Zenith International Film Corp. v. City of Chicago*, 291 F. 2d 785 (1961), decided on June 20, 1961, the United States Circuit Court of Appeals for the Seventh Circuit found that the procedural requirement of the Chicago ordinance violated the due process requirements of the Fourteenth Amendment and remanded the case to the district court. The Seventh Circuit held that the relief requested by the plaintiff should be granted, unless the City provided a hearing consistent with standards set out in its opinion.

The Seventh Circuit, however, went on to state in its opinion when and under what circumstances it would determine if a proper finding of obscenity had been reached. The court stated, at page 791:

> "If the film is found obscene or otherwise objectionable *after a proper procedural determination* by the

City authorities, plaintiff *may then* challenge before the District Court such finding of obscenity." (Emphasis supplied.)

The trial judge below, in his brief Memorandum Opinion, found that the Appellant's grounds of attack:

> "* * * collectively simply challenge the censors' basic authority and do not go to any statutory standards for procedural requirements as to the submission of the film. * * *.
>
> "* * * I have concluded that Article 66A, and in particular §2 thereof which is the basis of the charge, is valid and constitutional. Although this challenged section imposes a previous restraint, the ambit of constitutional protection does not include complete and absolute freedom to exhibit any and every kind of motion picture and this challenged provision, requiring the submission of films prior to their public exhibition, is not, on the grounds set forth by the defendant, void on its face."

The trial court concluded by quoting from Mr. Justice Clark's opinion in *Times Film Corp. v. City of Chicago*, *supra*:

> "It is not for this Court to limit the state in its selection of the remedy it deems most effective to cope with such a problem, *absent, of course, a showing of unreasonable strictures on individual liberty resulting from its application in particular circumstances.*" (Emphasis supplied.)

In affirming Appellant's conviction, the Maryland Court of Appeals agreed with the trial judge that Appellant lacked standing to challenge any portion of the statute excepting that portion for which he was indicted and convicted. The Court stated, at Apx. 24:

> "We conclude that on the authority of the *Times Films* case, *supra*, the Maryland censorship law must

be held to be not void on its face as violative of the freedoms protected against State action by the First and Fourteenth Amendments. * * *"

The State of Maryland believes that the trial judge and the Maryland Court of Appeals correctly stated the law, in determining that the Maryland statute is not void on its face. The Appellant, not having submitted his film for examination, cannot make a showing of unreasonable strictures on individual liberty resulting from the statute's application in particular circumstances and he is, therefore, without standing to challenge those strictures or standards.

CONCLUSION

The State of Maryland submits that the decision of the Court in *Times Film v. City of Chicago* is controlling in the instant case, and that the Maryland Court of Appeals correctly so found.

The Appellant presents no questions worthy of consideration by this Court, and it is respectfully requested that the decision of the Maryland Court of Appeals be affirmed, and that this appeal be dismissed.

Respectfully submitted,

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